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In the Supreme Court of the United States

OCTOBER TERM, 1966.

No. _____

CHARLES CARABBIA,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Court of Appeals, Mahoning County, Ohio (Seventh Ohio Appellate District).

OPINIONS BY COURTS BELOW.

One opinion was delivered by the Court of Appeals for Mahoning County, Ohio (Seventh Ohio Appellate District) wherein the verdict and judgment of the Common Pleas Court of Mahoning County, Ohio was affirmed. It was the judgment of that court that petitioner's right to a fair and impartial trial was not abridged. Three judges concurred in one opinion. The opinion and judgment of that court are set forth in the appendix hereto at pages 24-28. The opinion has not yet been officially reported. It is dated July 26, 1966 and is known on the docket of that court as case number 4466, State of Ohio vs. Charles Carabbia.

JURISDICTION OF THIS COURT.

The petitioner herein requests review of a judgment of the Court of Appeals for Mahoning County, Ohio (Seventh Ohio Appellate District), affirming the verdict and judgment of the Common Pleas Court, Mahoning County, Ohio (the trial court), wherein petitioner was found guilty of assault with a dangerous weapon, contrary to Ohio Revised Code Section 2901.241, under an indictment (a three count indictment) by the Grand Jury of said county; petitioner was sentenced to an indeterminate term of one to five years in the Ohio State Penitentiary at Columbus, Ohio.

Petitioner's "Memorandum in Support of Jurisdiction" which was duly filed in the Supreme Court of Ohio was overruled by said court on February 8, 1967. (Appendix, page 29) Thus, the Supreme Court of Ohio refused to accept jurisdiction respecting Petitioner's Appellate action predicated upon State and Federal Constitutional issues.

Jurisdiction to review the judgment of the Court of Appeals for Mahoning County, Ohio (Seventh Ohio Appellate District), said judgment being that of the highest court of the State of Ohio in which a decision could be had in Petitioner's cause, is found in Title 28, U. S. C., Section 1257(3).

QUESTIONS PRESENTED.

1. Did not petitioner suffer an abridgment of his Sixth Amendment rights to an impartial jury and right of confrontation and was the State of Ohio obligated by the Fourteenth Amendment to give equal protection of the laws where:

(A) A juror on voir dire deliberately failed to disclose her forty year friendship with a detective employed in the office of the prosecuting attorney, such detective having been named during voir dire, present in court and having engaged the juror in conversation during trial,

(B) The trial court overruled pre-trial motions for election of duplicating counts and overlapping counts, such motions having been renewed at the close of the State's case where such court found there could be no intent in two of such counts.

2. Did not petitioner suffer an abridgment of his Fifth Amendment and Sixth Amendment rights by being brought to trial with deliberate unwarranted speed, where he was compelled to be witness against himself during the accusatory and custodial state of proceedings and where at such times he was deprived of the right to the advice of counsel and later deprived of the effective representation by counsel.

CONSTITUTIONAL PROVISIONS INVOLVED.

CONSTITUTION OF THE UNITED STATES.

Amendment V:

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual

service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Amendment VI:

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Amendment XIV, Section I:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE.

Petitioner was charged in a three count indictment by the Grand Jury of Mahoning County, Ohio for the crimes of (1) Shooting with intent to kill, wound or maim, Ohio Revised Code Section 2901.23, (2) Assault with intent to kill, Section 2901.24, (3) Assault with a dangerous weapon or instrument likely to produce death or great bodily harm, Section 2901.241. The indictment[1] was filed as a true bill three days after petitioner's arrest during the early morning hours of March 2, 1964[2] and after he had been brought before a County Court Judge in the same jurisdiction on a "disturbance charge." Motion for bill particulars[3] was answered,[4] however motions to (1) quash the indictment for duplicity,[5] (2) continuance to allow counsel adequate preparation time,[6] (3) continuance to avoid widespread unfavorable news coverage of petitioner's charges,[7] were systematically and arbitrarily overruled.[8] The case was set for trial in contrast to urgent pleas by counsel for more time.[9]

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[1] The indictment appears at appendix pages 29-30.

[2] Time of arrest at or near 2:00 A.M. Tr. 407, 421.

[3] Appendix, pages 31-32.

[4] It is here urged that the state was limited to the bill of particulars, appendix page 32; discussion as to the effect on the jury verdict is set out at page 12 *post*.

[5] Appendix page 32.

[6] Appendix pages 33-34.

[7] Appendix page 35.

[8] In fact the case was placed for trial ahead of all cases then pending on the court's criminal trial docket.

[9] See motion for continuance and reasons set forth (pre-trial) filed on March 23 and 25, 1964. Appendix pages 32 and 35. (The motion and application were supported by affidavits by counsel and petitioner.) Appendix pages 36-37.

The *State's* evidence as to petitioner's activities on the night of March 1, 2, 1964 was conflicting.[10] The key witness testified as follows:

> Q. "Did you at any time * * * get hit by the telephone receiver?"
> A. "Yes * * * No."

Petitioner testified and admitted he hit her with a telephone receiver (Tr. 666-667) in an effort to disarm *her* and that *she* fired the gun. She was given first aid by police and taken to a hospital where further treatment was administered and immediately (within an hour or two) was released.

The relationship between petitioner and the key witness was very intimate (Tr. 213), however proposed changes were alleged by her (Tr. 210) due to petitioner's marital status.

She testified further that petitioner had questioned her whereabouts and threatened her (Tr. 174) and hit her with a gun and fired it at her (Tr. 176) and before firing it declared he was going to kill her (Tr. 177). There were blood stains on the telephone receiver[11] and blood stains on the front door (Tr. 193) and she saw a car and then said she ran out of the door, out and across her front yard (Tr. 199) and that petitioner came out behind her and she "hid" in a car and then ran to a neighbor's home (Tr. 202) and waited until the police arrived and she told

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[10] The Key Witness testified for the State that petitioner had a gun in his hand when he approached her (Tr. 169-170); the next *State witness* said she saw his hands and he *did not have a gun* (Tr. 251); the *third State witness* said he *did not* have a gun (Tr. 263).

[11] Identified by state medical witness as the same group type as that of the key witness (Tr. 376) (No determination could be made as to blood on the revolver, ibid.).

the police petitioner had a gun and they told her he did not.[12]

It has been previously pointed out that by presentation of the state's case there was a conflict as to whether petitioner ever had the gun in his hands (note 10, *supra*). He specifically denies it (Tr. 685, ll. 21-24).

Officer Huff testified he saw the petitioner come out of the house close behind the key witness, Rhonda, when he arrived at the scene at 1745 Mathews Road (Tr. 325).

He does *not* say he saw a gun.[13] He drove his cruiser onto the premises and he "hollered" at petitioner (Tr. 327) and at the same time Officer Stephenson arrived and noticed a bullet hole in the house next door (Tr. 330) and they commenced questioning petitioner who at this point denied knowledge (Tr. 328; ll. 10-12). He left "to find the girl" (Tr. 329) and the questioning of petitioner continued by Officer Stephenson (Tr. 330) who testified he said "hold it" to petitioner (Tr. 407)[14] and petitioner was searched (Tr. 409), "frisked" for "whatever I could find." Petitioner stated he did not know what they were talking about with reference to the hole in the house next door (Tr. 410). Petitioner was asked a few more times where the gun was and he was then handcuffed:

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[12] Significantly, the state evidence showed that her line of flight was southwest of her (?) home (Tr. 326); Officer Huff testified he saw her run from the yard (Tr. 325) and Chief Rhinehart testified the weapon was found in that line of flight (Tr. 477).

[13] We presume him to be a trained policeman although recent developments in the same jurisdiction show this police officer as having been charged with felonies committed while so employed by the same prosecution, as in the case at bar. He is awaiting trial; we feel compelled to comment, he has been so waiting for "Mahoning County Justice" for some 5-6 months at this writing. Compare with the case at bar!

[14] At trial he identifies the man he said "hold it" to as the petitioner. (Tr. 407, ll. 11, 12.)

"Q. What did you do then?"

"A. * * * I said: Until I get results, I said, you are going to be in my custody * * * and I handcuffed him." (Tr. 421.)

The gun was found and photographed and secured (Tr. 428) and in the meantime petitioner had been brought into the house, (Tr. 333) brought out and put in a cruiser and taken to the house where Rhonda was found (Tr. 385), searched or frisked three more times (Tr. 446) and petitioner again denied firing any shots (Tr. 453) saying then "She fired" (Tr. 454) and by this time petitioner was taken to the police station and Chief Rhinehart (Tr. 469) testified petitioner had been driven back to 1745 Mathews and he asked petitioner "why he shot at the girl" (Tr. 472) and asked how petitioner could account for the blood (Tr. 472, ll. 17-25) and he says petitioner "spread his hands" and gave no audible answer (Tr. 473). Others asked him to account for the bullet holes, blood on walls and "where is gun" (ibid) and *that petitioner was not "apprised" of the fact "that he was to be charged with a crime"* (Tr. 480, ll. 22-25). Interrogation continued at the police station (Tr. 481, ll. 1-25) and although the police took the time to call the County Prosecutor *and* the first assistant for legal advice:

"Q. What did you tell Mr. Osborne?"

"A. I apprised him of the fact that we had Mr. Carabbia in custody * * * that there was two bullet holes in one home and one in the neighbor's home * * *." (Tr. 482, 483.)

and up to this point the only person petitioner was permitted to talk to was Mr. Osborne for a "few minutes" whereupon petitioner pleaded to "charge him with disturbance and forget the whole thing." (Tr. 484.) The Chief went on to testify that it never entered his mind

that he "had not even given * * * thought * * * to maybe *who* could have or *who* could not have (fired the gun)" (Tr. 489). He admits there was talk at the station that petitioner fired the gun (other police officers) and that a paraffin test was "suggested," "mentioned," but he did not notice petitioner's action (Tr. 495)[15] and Assistant Chief Fink says he "was not looking" if petitioner had "extended his hands" (saying) "here take the tests." (Tr. 552, ll. 2-5.) Petitioner was told that charges would be filed (Tr. 561, ll. 13-15).

Petitioner had been under *custodial interrogation* from *approximately* 2:00 A.M. (Tr. 323) and handcuffed or in police detention until 9:30 A.M. that morning (Tr. 577, l. 12) when they went to County Court. Petitioner was permitted to call an attorney sometime after 7:30 A.M. (Tr. 517-518)[16] and although he evidenced the willingness to take the so-called paraffin test no interest was shown by the Chief or Assistant Chief to exculpate petitioner. (See note 15, *supra.*) Their only interest seemed to be to convict him!

At the close of the State's case, Counsel for petitioner renewed all motions[17] (Tr. 603-608), and it was argued

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[15] Officer Fink (Assistant Chief of Police) (Tr. 501, l. 11) testified on cross examination that petitioner was willing to take a paraffin test (Tr. 551 ll. 21-25, Tr. 553, ll. 1-5) and on redirect examination said "We haven't the facilities * * * none of us officers know anything about it." (Tr. 562 ll. 14-19) and later, on recross examination he said it did not occur to him to seek assistance on the paraffin test although Federal Bureau of Investigation facilities were available to them. (Tr. 565 ll. 13-23.) He didn't think the test was needed!

[16] This is associated in time with the call to Mr. Osborne, 7:15 A.M., 7:20 A.M. (Tr. 483, ll. 6-10). Mr. Van Brocklyn was called at 7:10 to 7:15 (they were at home at this hour) and there is further state evidence that Van Brocklyn was called as early as 2:30 A.M. by Asst. Chief Fink (Tr. 511, ll. 17-19).

[17] The motion to compel the state to elect. (Tr. 603, ll. 14-25). Also Appendix, page 31.

that since the State filed a bill of particulars the state must be held to it. The counts are duplicating (Tr. 608, ll. 20-22). The Court takes the correct view on this issue (Tr. 613, 614, 615):

> "The Court: Well, I do not think Count 3, under 2901.241 can be considered an included offense *with the other Counts.*" (Tr. 615, ll. 17-20.)

then at (Tr. 616) the Court discusses his reasoning and reserves the right to change his mind although he still thinks the 2nd and 3rd counts are duplicating and that the prosecutor must elect.[18] The Court goes on to say it may be error to include Count 3 as a lesser offense.[19] The State took the position later that Count 3 should be a lesser included offense and was about to make an election (Tr. 620 ll. 12-19) when the Court prevented this, changed position, and held on the basis of Ohio case law[20] (Tr. 621 ll. 16-19) that the motion to require the election should be overruled and the trial should proceed on all three counts! (Tr. 622 ll. 7-9.)[21] Exceptions were noted for petitioner and the trial concluded.

In closing argument petitioner was referred to as an "Adulterer" by the State and the State threw the weight of the Grand Jury indictment into the argument. (Tr. 903-904.) The Court ordered the jury to disregard the "improper" remarks (Tr. 904, ll. 6-8, 24 and Tr. 905 ll. 1-9).

The Court proceeded to charge the jury on all three counts (Tr. 931) and charged on lesser offenses (Tr. 939,

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[18] See the indictment, Appendix, pages 29-30 and Bill of Particulars, Appendix, pages 31-32.

[19] This is the position petitioner was taking. See also the Court's view at (Tr. 617 ll. 11-16). It should be noted that written motions requiring the state to elect were filed.

[20] *Ohio v. Kuchmach*, 159 O. S. 363 (1953).

[21] However see the trial court's view of Counts one and two; *post* footnote 22.

940) and a lesser offense on Count 3 (Tr. 942 l. 22). Counsel objected to such charge by the Court. (Tr. 953 ll. 20-25.)

The jury returned a verdict of Not Guilty on Counts 1 and 2 but guilty on Count 3. (Tr. 956.)

Motion for new trial was overruled by the trial court.[22]

Petitioner thereupon filed his appeal to the Court of Appeals of Mahoning County, Ohio (Seventh District) and alleged inter alia violation of Federal Constitutional Rights. On July 26, 1966 the said Court of Appeals in a memorandum of opinion (Case No. 4466) affirmed the trial court and set forth in such memorandum inter alia waiver of error, that petitioner should have "clearly shown" an abuse of discretion in not granting a continuance, and that other assignments of error were without merit and that petitioner's right to a "fair and impartial trial has been fulfilled * * *." (Appendix pages 27-28.)

Hence petitioner's right to be heard on the Constitutional issues involved was brushed aside and his later "Memorandum in support of jurisdiction," to the Supreme Court of Ohio was refused as hereinbefore set forth.

The Court of Appeals for Mahoning County, Ohio (Seventh Ohio Appellate District) is thus the highest court of the State, wherein a decision in this matter could be had.

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[22] Appendix, page 23; however the trial court said of the jury's verdict: "I agree with your verdicts on Counts one and two. As to Count one, shooting with intent to kill, I couldn't find intent to kill, I couldn't find intent to kill if I were sitting on the jury. On Count two, you come to the same problem * * *." (Tr. 959) (Hence it leaves a telephone receiver as a "dangerous weapon" or "deadly weapon" when used to disarm an armed assailant.) See indictment, Appendix pages 29-30.

REASONS FOR GRANTING WRIT.

QUESTION NO. 1.

A. Observing the abridgment of Petitioner's right to the due process of law concept that an individual will be imprisoned upon a conviction tainted by the misconduct of a juror where such juror deliberately failed to disclose[23] her relationship with a county detective, one Clyde Reed, dating back as far as 1923, after repeated questions were put to the jurors on voir dire[24] and where such juror admitted in her statement that she spoke with the said Clyde Reed during the times she was employed as a juror in the case at bar and observing further that Clyde Reed was "in the Courtroom during the time I was questioned as a juror" [25] is repugnant to the fair trial doctrine and the due process concept. This is at least as great a deprivation of petitioner's right to confrontation as in *Parker v. Gladden*, 384 U. S. 904, 86 S. Ct. 1345, 16 L. ed. 2d 357; 385 U. S. 363 (Dec. 1966), where this Court's rejected the State's argument that it showed no prejudice since Oregon law required only a 10-2 verdict. This Court found that "it involves such a probability that prejudice will result, that it is deemed lacking in due process" citing *Estes v. Texas*, 381 U. S. 532, 542, 543 (1965).

The Court of Appeals took the position that "this alleged error" was "waived" since petitioner's counsel was not "diligent." [26] It was argued by the State as "harmless."

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[23] Tr. 58 (exhibit: original statement signed by juror Olivia Brown). This statement is also set out in Appendix page 38.

[24] Tr. 10, l. 12; Tr. 11, ll. 1-3; Tr. 35, ll. 16-22; Tr. 36, ll. 1-3.

[25] Appendix, page 38 statement of Olivia Brown.

[26] No waiver, unless by federal standards. Cf. *Henry v. Mississippi*, 379 U. S. 443 (1965) and *Jackson v. Denno*, 378 U. S. 368 (1964) where the Court held no objection is necessary to preserve a constitutional issue for review. As to the Waiver notion see *Johnson v. Zerbst*, 304 U. S. 458.

However, this United States Supreme Court struck down both notions in *O'Conner v. Ohio*, __ U. S. __; 17 L. ed. 2d 189, 87 S. Ct. __ (Nov. 14, 1966), just four months after the Ohio Appellate Court announced its decision[27] and then just seven months later the Court held in *Chapman v. California*, __ U. S. __; 35 L. W. 4197 (Feb. 20, 1967) (Law Week, advance sheets), there are some constitutional rights "so basic to a fair trial that their infraction can never be treated as harmless error" and the Court went on to list some examples such as the absence of an impartial Judge. The Court then turned its attention to the test; a "federal constitutional harmless error test." The "reasonable possibility of prejudice" test announced in *Fahy v. Connecticut*, 375 U. S. 85 (1963). In *Chapman* the petitioner had relied on this Court's announcement in *Griffin v. California*, 380 U. S. 609 (1965), and the Supreme Court of California while acknowledging *Griffin* found under the *State's harmless error provision* that the conviction could not be reversed even in the light of *Griffin*. The situation is the identical in Ohio.

B. It is respectfully submitted that in commenting on the subquestion "B," petitioner urges that in the present day policy the trial courts seem to lean too heavily on the "harmless error" doctrine. This question is answered by observing the trial court's comments (Tr. 959)[28a] after the jury acted on *three counts*. It is logically obvious by the facts in this case that the jury reached a compromise verdict. The Court should have disposed (at the very

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[27] The decision in *O'Conner v. Ohio* was made public by the Supreme Court in November, the Court of Appeals of Ohio made the decision in the case at bar on July 26, 1966.

[28a] This comment by the trial court (Tr. 959) is set out in footnote 22, "statement of case," *supra*.

least) of counts one and two by means of a directed verdict, given the Court's state of mind as reported by the court after the jury had reached its verdict. Submitting the three counts to the jury on the factual situation at bar subjected petitioner to an abridgment of his fifth amendment right, not to be subjected to the same offense, to be put twice in jeopardy of liberty. The State of Ohio is obligated by the Fourteenth Amendment to apply minimal federal harmless error tests to such a situation; viz, where the probability of prejudice may come about. *Parker v. Gladden*, 385 U. S. 363 (1966); *Fahy v. Connecticut*, 375 U. S. 85 (1963).

This case should be remanded to the Ohio Appellate Court to reconsider on the basis of *Parker v. Gladden*, *Estes v. Texas*, *O'Conner v. Ohio* and *Chapman v. California* (*supra*).[28]

QUESTION NO. 2.

Accusatory and Custodial Violation.

The Constitutional requirement that one accused of crime is entitled to Counsel has been disposed of in Ohio for many years on the theory that the offering of counsel to one at the immediate pre-trial state of the proceedings is sufficient[29] and that no rights or defenses are lost up to and including the preliminary hearing stage of proceedings. *Crider v. Maxwell*, 187 N. E. 2d 875 (Ohio Supreme Court).

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[28] All except *Estes v. Texas* were decided after the Court of Appeals for Ohio ruled in the case at bar. (Hence the normal appellate process doctrine discussed *post* page 17, applies here as well.)

[29] Cf. *Crider v. Maxwell*, 174 Oh. St. 190, 192; 187 N. E. 2d 875; where it is illustrated and held by the Ohio Supreme Court that a preliminary hearing is not a critical step in Ohio Criminal procedure; that "no *rights* or *defenses* are *lost* therein * * *." *Contra*: *Pointer v. Texas*, 380 U. S. 400.

The case at bar was on trial during the week of March 30 to April 6, 1964.

Petitioner was handcuffed until results could be had and held in custody.[30] Petitioner was frisked at least three times and *not* apprised of the *fact* that he would be charged with a crime[31] at the *custodial interrogation* stage of the police action of this matter.

It is clear that petitioner's Fifth Amendment rights were violated. The Ohio Court of Appeals failed to take note of the plain error committed by the trial Court in allowing the statements made by petitioner during the *accusatorial and custodial* interrogation process to be admitted against him at the trial. The Court of Appeals disposed of the matter with the observation "We have *considered* the other assignments of error of the defendant and find them without merit." (Emphasis ours.) Appendix, page 27. The Court went on to *conclude* that defendant received a fair trial.

Where police officials have not effectively warned the accused of his absolute constitutional right to remain silent, the accused has been denied "the assistance of counsel" proviso of the Sixth Amendment; this proviso is made obligatory via the Fourteenth Amendment. *Giddeon v. Wainwright,* 372 U. S. at 342: no statement elicited by the police during the interrogation may be used against him at a criminal trial. *Escobedo v. Illinois,* 378 U. S. 478 (1964) (pp. 490-491: numbers added). The *Escobedo* opinion was handed down on June 22, 1964, three months after the trial of the case at bar. *Escobedo* was followed within one week by *Miranda v. Arizona,* 384 U. S. 436, (1966), 16 L. ed. 2d 694, and *Johnson v. New Jersey,* 384 U. S. 719 (1966), 86 S. Ct. 1772, 16 L. ed. 2d

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[30] Tr. 421.

[31] Tr. 480 ll. 22-25.

882; *Miranda* was the lead case of several dealing with the matter of confessions. This Court shifted from its previous reliance on the constitutional right to counsel and chose instead to rule out the admissibility of confessions on the strength of the Fifth Amendment's privilege against self incrimination. This Court in fact extended the privilege to embrace *all persons subjected to custodial interrogation.*" (Emphasis ours.)

Miranda implemented the established constitutional right by imposing upon law enforcement officials a system of pre-interrogation warnings and advice as *Federal constitutional imperatives* for the admissibility of confessions in both *Federal* and *State* Court prosecutions. Hence a person who is taken into custody or deprived of his freedom of action in any meaningful way must, before being questioned by law enforcement officials, be *effectively* and *unequivocally* informed: (1) that he has a right to remain silent, (2) statements made by him may be used against him, (3) he has a right to the presence of an attorney during interrogation and if he cannot afford one he should be supplied one without cost to him. The Court made it crystal clear that a half-hearted or equivocal warning is inadequate and the warnings must be given *before* interrogation begins. *The required warnings apply to exculpatory as well as incriminating statements, and to partial admissions as well as full confessions.*[32] The instant case clearly illustrates a violation of the principles intended to be binding on State court prosecutions.[33] This Court in

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[32] "In fact statements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial or to demonstrate untruths * * * and thus prove guilt by implication." *Miranda v. Arizona,* 384 U. S. 436. (Emphasis ours.)

[33] See FF Tr. pp. and ll: Tr. 328, ll. 10-12; Tr. 407; Tr. 409; Tr. 410; Tr. 421; Tr. 446; Tr. 453; Tr. 454; Tr. 472; Tr. 480; Tr. 481; Tr. 482, 483; Tr. 489; Tr. 495 (The paraffin test issue); Tr. 552 ll. 2-5; Tr. 565 ll. 13-23.

Miranda adhered to an unbroken line of decisions (under the traditional voluntary test) which preclude the application of a harmless error rule to the improper admission of statements taken in violation of the privilege against self incrimination.[34]

Turning then to the obvious matter of the retroactivity argument that is certain to appear, it should be noted that *Johnson v. New Jersey,* 384 U. S. 719 (June 20, 1966), decided that *Escobedo v. Illinois,* 378 U. S. 478 (June 22, 1964), and *Miranda v. Arizona,* 384 U. S. 436 (June 13, 1966), need not be applied to trials which began prior to dates of those decisions. However, the Court's prospective application of *Miranda* and *Escobedo* simply reaffirm the opinion expressed in *Linkletter v. Walker,* 381 U. S. 618 (1965) [35] and the instant case is clearly within the ambit of that decision (Viz; the "normal appellate process") since the opinion of the Ohio Court of Appeals is dated July 26, 1966 and the Ohio Supreme Court's refusal to allow jurisdiction and review was dated February 8, 1967 (See appendix pages 24-28, 29).

There appears to be one test to be disposed of before a "clear violation" of petitioner's rights may be asserted; that is the voluntary statement test. In *Miranda, supra,* Chief Justice Warren clearly stated that volunteered statements of *any kind* are not barred by the Fifth Amendment. Further that "(G)eneral on the scene questioning as to facts surrounding a crime or the general questioning of

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[34] Cf: *Payne v. Arkansas,* 356 U. S. 560; *Spano v. New York,* 360 U. S. 315; *Lynum v. Illinois,* 372 U. S. 528; *Haynes v. Washington,* 373 U. S. 503.

[35] In *Linkletter* it was held that *Mapp v. Ohio,* 367 U. S. 643, was applicable only to cases still in the normal appellate process at the time the decision was handed down. (Recalling that *Mapp v. Ohio* made the "exclusionary rule" applicable to the states.)

citizens in the fact-finding process is not affected by our holding." Clearly, the statements in the instant case are otherwise.[36]

The petitioner has been denied his right to counsel at the accusatorial and custodial interrogation state of the proceedings against him and the testimony of the police officers heretofore illustrated show that such statements were admitted against him at his trial. Petitioner has been denied his rights under the Fifth Amendment of the United States Constitution made obligatory upon the State of Ohio via the Fourteenth Amendment of the United States Constitution. The Ohio Appellate Court should be required to view petitioner's case by employing minimal federal standards via the due process concept.

Reverse Application of the Speedy Trial Doctrine.

Further regarding petitioner's right to due process of law and the concept that one accused of crime is entitled to counsel at the point where criminal investigation focuses upon the petitioner, such representation by counsel must be deemed "effective representation" to satisfy federal constitutional requirements grounded in the Sixth Amendment of the United States Constitution.

Assuming arguendo that one who selects his counsel must be required to abide his choice; and

Assuming further that petitioner's choice of counsel in the case at bar was a choice of learned counsel (the fact

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[36] See Tr. 421. "Q. What did you do then?" (the police officer) "A. * * * I said: Until I get results, I said, you are going to be in my custody * * * and I handcuffed him." (The petitioner.)

See also Tr. 323 for the time when the investigation "focused" upon petitioner. This was just prior to the handcuffing incident.

is that such counsel stood alone),[37] how would such counsel compare with the numbers advantage held by the law enforcement officials? Furthermore, this should be considered in the light of the time allowed by the trial judge for counsel to prepare for trial.

The facts here show clearly that petitioner was accused at or near 2:00 o'clock on March 2, 1964, indicted[38] three days later and his case set for trial ahead of all other criminal matters pending on the trial court's docket. The trial was set for March 30, 1964. Motions were filed by counsel for petitioner and affidavits submitted to the trial court for continuance of the case[39] to give counsel more time to investigate, prepare and also avoid massive news media publicity unfavorable to petitioner.[40]

The meaning of *Giddeon v. Wainwright,* 372 U. S. 342, is clearly defeated and Sixth Amendment rights are meaningless if counsel, no matter how eloquent in these modern times, is severely limited for preparation time to insure an *effective,* well planned defense.

The Fourth United States Circuit Court held in *Martin v. Peyton,* ____ F. 2d ____ (CA 4 1966) that a lapse of three and one-half hours between indictment, appointment of counsel and trial makes the likelihood of prejudice from *inadequate assistance* of counsel sufficiently great to warrant setting aside the conviction. However, contra is the notion set down by the Ninth Circuit in *Allen v. Wilson,*

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[37] The prosecution staff consists of at least six lawyers, two investigators, plus the four police constables of the Boardman Township Police and the investigators employed by the Mahoning County, Ohio Sheriff's Department.

[38] By means of a "secret indictment" bypassing normal preliminary steps provided for by Ohio Criminal Code.

[39] See Appendix pages 33-34.

[40] See Appendix page 35.

365 F. 2d 881 (1966) where a ten minute interval between assignment of counsel and commencement of a three day robbery trial was held *not* to violate defendant's right to effective assistance of counsel.[41] The Tenth Circuit takes the view (Habeas Corpus Action) that where counsel testified he gave *ineffective assistance*, the court would "look to the record" to determine if constitutional standards were followed. *Alire v. United States*, 365 F. 2d 278 (CA 10 1966).

The speedy public trial doctrine grounded in the Sixth Amendment is the right of the *accused*, not the prosecution. Instant justice at the trial or pre-trial stage can *never* be a consistent substitute for *true* justice, which requires time for brewing, blending and often brooding.[42] Haste, hardness of manner, deafen the ear of reason when trial of civil and criminal cases alike are attended to by instant, capsule-like judicial fact finding process.

Obviously one lawyer charged with the investigation and preparation of case law—interviewing of witnesses, the search for evidence and heavy burden of investigating prospective jury panels[43] places an awesome burden upon counsel. The constitutional safeguards are gone when the

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[41] It should be noted that in *Allen v. Wilson*, 365 F. 2d 881 the defendant was given time to select counsel and he repeatedly apprised the court of excuses as to why he did not have counsel available. The court then appointed counsel and proceeded and during a recess where the defense was permitted to look at reports in the District Attorney's office counsel did not then or at any later time request a continuance.

[42] "The Case Against Instant Justice," Bernard Botein, Presiding Judge, New York Supreme Court; cf: *American Bar Association Journal*, August, 1960, Volume 52 p. 713, at p. 714: "We cannot continue to mete out thin, albeit speedy, justice without eventually weakening, perhaps destroying, public confidence in the courts."

[43] See discussion of the jury problem in the instant case and its obvious effect herein at page 12 *supra*.

latter is compared with the "no expense barred" tactics of public paid law enforcement armadas, bolstered with scientific armament, great numbers and a favorable prosecution press bombarding the defendant with unfavorable headlines[44] prior to and during trial. The wake of *Giddeon* albeit satisfactory shows that the ugly head of the serpent is now lack of *effective representation.* The truth finding process is certain to suffer.

Petitioner has been denied his rights under the Sixth Amendment, United States Constitution, which is made obligatory upon the State of Ohio via the Fourteenth Amendment, United States Constitution. The Ohio Courts should be required to afford petitioner minimal federal standards of due process in view of unwarranted speed in bringing petitioner to trial thereby denying him effective representation.

CONCLUSION.

Where the defendant (petitioner) is questioned by police at the accusatory and custodial stage of the investigation without (1) effective and unequivocal warning of his Federal Constitutional privilege against self-incrimination, (2) the presence and benefit of the assistance of counsel, statements made by the defendant at such times if admitted into evidence against him violate the privilege against self incrimination grounded in the Fifth Amendment of the United States Constitution.

One accused of crime is entitled to the *effective* assistance of counsel. Where counsel for the accused is unreasonably limited for time within which to prepare the defense of the case, absent a lack of diligence on the

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[44] Examples of the treatment afforded petitioner would so flood this record that it (the record) would nearly rival *Sheppard v. Maxwell,* 384 U. S. 333, 1966, 86 S. Ct. 1507, 16 L. ed. 2d 600.

part of the accused and/or his counsel, the right of the accused to the assistance of counsel grounded in the Sixth Amendment of the United States Constitution is not fulfilled.

One charged with crime is entitled to a fair and impartial trial; if the trial be by jury, misconduct by one of such jurors is a denial of due process of law.

The right to a speedy trial as set forth in the Sixth Amendment of the United States Constitution is the absolute right of the accused and not the right of the prosecution. Where the record discloses that the defendant was not properly warned of his federal constitutional rights at the accusatory-custodial stage of the proceedings, was not allowed the benefit of *effective* assistance of counsel, was arrested, indicted, and brought to trial within twenty-eight days, the case being placed ahead of all other cases pending on the trial court's docket such court rejecting counsel's motions for more time to prepare the case, such facts bring about a probability of prejudice and the State Court of Appeals should look to the record as a whole to determine the violation of Sixth Amendment rights.

In a criminal trial in a state court the accused is entitled to the application of the federal harmless error tests on matters affecting Federal Constitutional questions.

State Courts are bound to apply the Fifth and Sixth Amendment Rights of the United States Constitution by means of federal standards and not state standards. This is made obligatory upon the States by the Fourteenth Amendment.

Respectfully submitted,

CHARLES CARABBIA,
Petitioner Pro Se.

DON L. HANNI,
Attorney for Petitioner.

APPENDIX.

JOURNAL ENTRY OF THE COURT OF COMMON PLEAS.

(Journal 269, page 635.)

(Entered April 17, 1964.)

This day came on for hearing the motion for new trial filed herein, and the defendant, Charles Carabbia, being present in Court with counsel and the Prosecuting Attorney being present, the motion was heard and submitted; and thereupon the Court after full and due consideration overrules the same, with exceptions noted.

Defendant in open court waives his statutory right to file an application for probation.

Thereupon the Court proceeds to sentence; and the Court inquires of defendant, Charles Carabbia, whether he have anything to say as to why sentence should not be pronounced, it is the sentence of the Court that defendant, Charles Carabbia, be taken from here to the County Jail and from thence to the Ohio State Penitentiary there to serve an indeterminate term according to law, of not less than 1 year nor more than 5 years and to pay the costs, this sentence being under R. C. 2901.241. Stay of execution is granted for 30 days to file an appeal and sentence is suspended under R. C. 2953.09 pending completion of appellate proceedings, upon giving recognizance in the amount of $10,000.00.

E. MAIDEN, JR., *Judge.*

OPINION OF THE COURT OF APPEALS.

(Dated: July 26, 1966.)

LYNCH, *J.*

This is an appeal on questions of law by defendant-appellant on his conviction of assault of Rhonda Pinciaro with a loaded .38 caliber revolver and a sentence of one to five years in the Ohio State Penitentiary.

Defendant was indicted on three counts with reference to the alleged assault on Rhonda Pinciaro, namely, (1) shooting with intent to kill, wound or maim contrary to Section 2901.23, Revised Code, (2) assault with intent to kill contrary to Section 2901.24, Revised Code, and (3) assault with a dangerous weapon or instrument likely to produce death or great bodily harm contrary to Section 2901.241, Revised Code.

Defendant filed motions to quash the indictment and to compel the State of Ohio to elect between counts in the indictment, which were overruled. After trial, the jury found defendant guilty under Count No. 3, and not guilty under Counts No. 1 and No. 2.

A review of the record reveals ample evidence to substantiate the verdict of the jury; therefore, we overrule defendant's eighth assignment of error which contends that the verdict of the jury is contrary to the weight of the evidence and the law.

Defendant's sixth assignment of error alleged misconduct on the part of juror, Miss Olivia Brown, who failed to disclose on voir dire examination, while under oath, that she was acquainted with Mr. Clyde Reid, who is employed as a detective by the County Prosecutor. Miss Brown signed a statement that she was introduced to Mr. Reid through one of her friends many years ago. She spoke to Mr. Reid during the course of the trial, and this came to the attention of the attorney for defendant,

who spoke to Mr. Reid concerning this. This trial commenced on March 30, 1964, and the attorney for defendant in a signed affidavit admitted that he knew about Mrs. Moore talking to Mr. Reid by April 3, 1964. However, this was not called to the attention of the Trial Judge, even though the trial continued to April 6, 1964. If this had been called to the attention of the Trial Judge, and if the acquaintanceship of Miss Brown and Mr. Reid had been considered prejudicial to defendant by the Trial Judge, Miss Brown could have been dismissed and the alternate juror could have replaced her. We hold that defendant did not exercise due diligence in calling this incident to the Trial Court's attention when his attorney knew about it in time for it to be corrected, and that the defendant has thereby waived any claim to this alleged error. 4 *Ohio Jurisprudence* (2d) 474, Section 1129.

Moreover, Mr. Reid testified that he had been employed with the Youngstown Police Department for almost thirty years prior to his present employment; that Miss Brown did speak to him during the course of the trial, but that he had no recollection of having even seen Miss Brown previously.

We cannot see how the bare acquaintanceship of Miss Brown with Mr. Reid could in any way influence either Miss Brown or the ultimate jury verdict. There is nothing in the record to indicate that Miss Brown's failure to disclose her acquaintanceship with Mr. Reid was intentional. We, therefore, hold that Miss Brown's presence on this jury was not prejudicial to the defendant.

In his fifth assignment of error defendant claims that a witness, Assistant Chief Robert Fink, of the Boardman Township Police Department, gave a highly prejudicial answer (page 556, Volume 3). On cross-examination, Officer Fink had testified that he had followed defendant

to Rhonda Pinciaro's residence on several occasions prior to the incident which is the subject of this case. On redirect examination, Officer Fink was asked why he followed defendant's car on prior occasions, to which he answered:—

"He is a known racketeer, sir."

Defendant's attorney moved that this answer be stricken and that the Court withdraw a juror and continue this case. The Court ruled as follows:—

"That is stricken out as being a conclusion and the jury will disregard it. That is merely his opinion and opinions do not count at all. The motion to withdraw is overruled. Exception."

We hold that the Trial Court adequately cautioned the jury on this testimony, and that under the circumstances of this case, this was not prejudicial to the defendant.

We hold that the first two assignments of error which contend that the Trial Court erred in overruling the motions of defendant to quash the indictment and to order the State of Ohio to elect between counts in the indictment are not well taken. Section 2941.04, Revised Code. 28 *Ohio Jurisprudence* (2d) 482-486, Sections 69-71. See *Overmyer v. Sacks*, 174 Ohio St. 129; *Bates v. State*, 27 Ohio App. 391.

We also hold that the defendant's third assignment of error, which contends that the Trial Court erred in refusing the motion of defendant for continuance of the case is not well taken. 3 *Ohio Jurisprudence* (2d) 730, Appellate Review, Section 765, states as follows:—

"An application for the continuance of a case is addressed to the sound discretion of the court, and its action cannot be reversed on error unless it clearly appears, from all the facts and circumstances, that

there has been an abuse of this discretion, operating to the prejudice of the party in the final determination of the case. * * *."

We hold that defendant has not clearly shown that the Trial Court abused its discretion in overruling this motion.

We also hold that defendant's fourth assignment of error, which contends that the Trial Court erred in limiting and restricting defendant in the interrogation of the members of the jury panel on the voir dire examination is not well taken. The counsel for defendant was given wide latitude in his questioning of prospective jurors, and the record shows the Trial Court kept the examination within proper limits.

32 *Ohio Jurisprudence* (2d), 663, Jury, Section 73, states in part as follows:

"* * * the scope and extent of the examination is largely within the discretion of the trial judge, and is not a ground for reversal unless there is a clear abuse of such discretion; * * *."

We hold that there was no such abuse of discretion in this case.

We have considered the other assignments of error of defendant and find them without merit.

After a careful examination of the record of this case, we conclude that this case was tried in a fair and thorough manner by experienced counsel for both sides before an experienced Judge. Counsel for both sides and the Trial Judge ably performed their respective roles in the trial of this case. We conclude that defendant received a fair trial.

There was an issue of fact in this case which was properly submitted to the jury. We feel that the verdict of the jury indicates that they gave careful consideration

to the evidence in this case. Defendant's right to a fair and impartial trial has been fulfilled, and he must abide by the verdict of the jury.

Judgment affirmed.

Approved:

JOHN J. LYNCH,
Judge.

JOHNSON, *P. J.*, Concurs.
JONES, *J.*, Concurs.

JOURNAL ENTRY OF THE COURT OF APPEALS.

(Filed October 13, 1966.)

This cause came on for hearing upon the appeal on questions of law, assignments of error, bill of exceptions, the transcript and the original papers and pleadings from the Court of Common Pleas, Mahoning County, Ohio, and was argued by counsel. On full consideration thereof the Court finds there is no error apparent on the record in said proceedings and judgment prejudicial to the Appellant.

It is therefore considered by the Court that the judgment of the Court of Common Pleas be and the same is hereby affirmed at the costs of the Appellant.

It is further ordered that a special mandate be sent to the Court of Common Pleas of Mahoning County, Ohio, for execution upon this judgment.

To all of which Appellant, by his counsel, excepts.

NILS P. JOHNSON,
GEORGE M. JONES,
JOHN J. LYNCH,
Judges of the Court of Appeals
Seventh District.

ENTRY OF THE SUPREME COURT OF OHIO DISMISSING THE APPEAL AS OF RIGHT.

(February 8, 1967.)

This cause, here on appeal as of right from the Court of Appeals for Mahoning County was heard in the manner prescribed by law and upon motion of the appellee to dismiss such appeal.

On consideration thereof, such appeal is dismissed for the reason that no debatable constitutional question exists herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; that a mandate be sent to the Common Pleas Court to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Mahoning County for entry.

INDICTMENT FOR INTENTIONAL SHOOTING; ASSAULT WITH INTENT TO KILL; ASSAULT WITH A DANGEROUS OR DEADLY WEAPON (3 COUNTS) (FELONY).

THE STATE OF OHIO, MAHONING COUNTY, SS.

In the Court of Common Pleas, Mahoning County, Ohio, of the Term of January in the year of our Lord one thousand nine hundred and sixty-four.

The Jurors of the Grand Jury of the County of Mahoning, and State of Ohio, then and there duly empaneled, sworn and charged to inquire of and present all offenses whatever committed within the limits of said County, on their said oaths, in the name and by the authority of the State of Ohio, do find and present:

That Charles Carabbia, late of said County, on or about the 2nd day of March in the year of our Lord one

thousand nine hundred and sixty-four, at the County of Mahoning aforesaid,

FIRST COUNT: Did unlawfully and maliciously shoot at one Rhonda Pinciaro with intent to kill, wound or maim said Rhonda Pinciaro contrary to the statute in such cases made and provided and against the peace and dignity of the State of Ohio, to-wit: Revised Code 2901.23.

SECOND COUNT: And the said Grand Jury does further find and present that the said Charles Carabbia, late of said County, on or about the 2nd day of March, 1964, did unlawfully assault Rhonda Pinciaro with intent to kill her, contrary to the statute in such cases made and provided and against the peace and dignity of the State of Ohio, to-wit: Revised Code 2901.24.

THIRD COUNT: And the said Grand Jury does further find and present that the said Charles Carabbia, late of said County, on or about the 2nd day of March, 1964, did unlawfully assault one Rhonda Pinciaro with a dangerous weapon or instrument likely to produce death or great bodily harm, to-wit: a loaded .38 caliber revolver, contrary to the statute in such cases made and provided and against the peace and dignity of the State of Ohio, to-wit: R. C. 2901.241.

CLYDE W. OSBORNE,
Prosecuting Attorney.

MOTION TO COMPEL THE STATE OF OHIO TO ELECT.

(Filed March 16, 1964.)

Now comes the Defendant herein, Charles Carabbia, and respectfully moves the court for an order to compel the State of Ohio to elect in the following manner, to-wit:

1. To state the particular act proscribed in the first count of the indictment by which it expects to sustain its case; that is, whether the act upon which the State of Ohio relies to sustain its case is INTENT TO KILL, INTENT TO WOUND, or INTENT TO MAIM.

2. That the State of Ohio be compelled to elect the particular count in the indictment under which it proposes to prove its case against the Defendant.

Respectfully submitted,

MICHAEL W. KOSACH,
Attorney for Defendant,
Charles Carabbia.

BILL OF PARTICULARS.

Comes now the State of Ohio, Plaintiff, by and through Clyde W. Osborne, Prosecuting Attorney for the County of Mahoning in said State, in answer to the Motion of defendant for a Bill of Particulars, files herewith its Bill of Particulars in the above case:

1. The State of Ohio will prove in the trial of Count Number Two in said indictment that defendant, Charles Carabbia, struck the victim, Rhonda Pinciaro, on or about the head with a 38 caliber revolver; that he pointed said revolver at the said Rhonda Pinciaro and that he fired the said revolver at the said Rhonda Pinciaro with intent thereby to kill her.

2. The State of Ohio will prove in the trial of the Third Count of said indictment that the defendant, Charles Carabbia, orally threatened to kill one, Rhonda Pinciaro; that he then struck her on or about the head with a 38 caliber revolver; and that he then pointed and discharged the said revolver at the said Rhonda Pinciaro.

Respectfully submitted,

CLYDE W. OSBORNE,
Prosecuting Attorney.

MOTION OF CHARLES CARABBIA TO QUASH INDICTMENT.

Now comes the Defendant herein, Charles Carabbia, and moves the court to quash the indictment herein, by reason of certain defects apparent upon the face of the record, in this, to-wit:

1. For duplicity of allegations of the several counts contained in the indictment.

2. Indefiniteness and uncertainty of the means and manner of the commission of the acts proscribed in Counts No. Two (#2) and No. Three (#3) of the indictment.

Respectfully submitted,

MICHAEL W. KOSACH,
Attorney for Defendant,
Charles Carabbia.

APPLICATION FOR CONTINUANCE.

(Filed March 23, 1964.)

Comes now the Defendant and through his attorney respectfully moves this court to continue the date of trial herein fixed pursuant to the provisions of Revised Code, Section 2945.02 for the within entitled matter and for his reasons therefor said attorney gives the following reasons for the within application:

1. That said attorney has pending in the Court of Appeals a certain cause numbered 4368 entitled "Richard H. Bloomingdale vs. Richard C. Greene" which will require preparation for argument.

2. That said attorney is required to file assignments of errors and briefs in the following cases: Dorothy Rockenberger vs. Esther C. Porter, No. 165060, and Don Withers vs. Robert W. Gardner, et al., No. 168807, which will require research of the law for the brief, reading of the Bill of Exceptions for the assignments and preparation of pleadings in said causes.

3. That Defendant's counsel is required to prepare and file trial briefs in certain actions now pending before the Honorable Sidney Rigelhaupt; that the preparation and research of said briefs will require considerable amount time.

4. That Defendant's counsel has numerous cases on the trial docket of the common pleas court which will require taking of certain depositions in said cases which will consume considerable amount of time and effort; that said cases are subject to call for trial momentarily and that in the preparation of the trial of said cases considerable amount of time will be required to interview the witnesses for the trial of said causes.

5. That Defendant attorney has at least 4 causes pending in the Court of Domestic Relations which

have been especially set for the week of March 23, 1964; that said matters will require time and effort to prepare the same.

6. That Defendant's counsel has numerous and sundry witnesses to interview in the within entitled cause herein pending and that because of the trial date herein set Defendant's counsel will be unable to fully prepare the defense of the Defendant's cause.

7. That Defendant's counsel will require time and effort to research the law pertinent to various written pleadings that may be filed in the within entitled cause prior to the trial thereof.

8. That Defendant's counsel is pressed for time and effort in the preparation of Complaints to be filed in the Federal Court for 4 wrongful deaths by 4 separate Plaintiffs.

9. That because of the urgent and pressing matters of business, Defendant's counsel has been compelled to decline retainment and representation in two legal matters for which Defendant's counsel has been solicited within the last 48 hours.

10. That Defendant's counsel seeks a reasonable period of time to elapse between the filing of the within request and the date of trial in the within entitled cause in order that the rights of the Defendant will not be jeopardized and adequately protected.

Respectfully submitted,

MICHAEL W. KOSACH,
Attorney for Defendant,
Charles Carabbia.

MOTION FOR CONTINUANCE.

(Filed March 25, 1964.)

Comes now the Defendant and through his attorney respectfully renews his motion heretofore filed on March 23, 1964, to continue the within entitled cause for reasons stated in the Application for Continuance heretofore filed which are incorporated herein by reference and for the additional following reasons:

1. That the within cause has been unduly, extensively, unwarrantably publicized continuously thereby engendering passion and prejudice against this Defendant.

2. That a reasonable elapse of time should pass to subside the adverse, prejudicial, and unfair publicity disseminated through the various media of communication in Mahoning County regarding the cause of this Defendant.

3. That this Defendant's rights under the Constitution of the United States, the State of Ohio, and the laws of the State of Ohio are prejudiced and violated by compelling him to proceed with the trial of his cause without affording him and his counsel a reasonable and sufficient time to prepare for the defense thereof.

Respectfully submitted,

MICHAEL W. KOSACH,
Attorney for Defendant,
Charles Carabbia.

AFFIDAVIT IN SUPPORT OF MOTION FOR CONTINUANCE.

(Filed March 25, 1964.)

Personally appeared before me, a Notary Public, in and for the aforesaid county and state, Michael W. Kosach, who after being first duly sworn according to law says and deposes that he is the attorney of record representing the above named Defendant.

Deponent further says that he is unable to adequately and properly prepare the defense of the Defendant, Charles Carabbia, in the above entitled cause within the period of time wherein he was retained by the Defendant and the date of trial herein, to-wit: 9:00 A.M. March 30, 1964.

Your Deponent further says that by reason of the matters set out in the Motion filed in this court for a continuance and by the further reason that he has inadequate time to interview and consult sundry witnesses essential and necessary to the preparation and defense of this cause who are subject to be called in the trial herein, the ends of justice require a continuance.

Your Deponent further says that he is unable because of insufficient time for preparation to interview and communicate with person and/or persons who may have information, facts, and knowledge for the proper preparation of the trial defense of the Defendant herein.

Further your Deponent sayeth naught.

MICHAEL W. KOSACH.

(Jurat omitted.)

AFFIDAVIT.

(Filed March 25, 1964.)

Personally appeared before me, a Notary Public, in and for the aforesaid county and state, Charles Carabbia, who after being first duly sworn according to law says and deposes that he is the Defendant in the above entitled cause.

Your Deponent further says that there are sundry persons that require to be interviewed in the preparation of the defense of the within entitled cause; that your Deponent believes and avers that there is insufficient time for him to make adequate preparation for his defense by reason of the trial date fixed for the within entitled cause.

Wherefore, your Deponent says that the ends of justice and the preservation of his legal and constitutional rights in the within entitled cause require that he be granted sufficient reasonable time for the preparation of his defense and that the trial date of this cause be continued.

CHARLES CARABBIA.

(Jurat omitted.)

AFFIDAVIT OF OLIVIA BROWN.

April 7, 1964

My name is Olivia Brown and I live on 555 W. Madison in the city of Youngstown. I was a member of the jury that heard the Charles Carabbia case last week in Judge Maidens court room. I have known Mr. Clyde Reed ever since I've been around here and that has been since 1923. I was introduced to him through a friend of mine some years ago. The week I was called for jury duty I saw him in the court house practically every day and would speak to him even during the time I was setting on the Carabbia trial. He was in the court room during the time I was questioned as a juror and during the time the jury was asked whether or not they knew any members of the prosecutors staff.

I have read the above statement and say that the facts contained therein are true to the best of my knowledge.

(Signed) OLIVIA BROWN

April 7, 1964.

SUPREME COURT, U. S.

JUL 15 1967

JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1966.

No. [redacted] 168

CHARLES CARABBIA,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

THOMAS R. ZEBRASKY,
Assistant Prosecuting Attorney,
Attorney of Record for Respondent.

CLYDE W. OSBORNE,
Prosecuting Attorney,

WILLIAM G. HOUSER,
Assistant Prosecuting Attorney,
Attorneys for Respondent,
Mahoning County Court House,
Market Street,
Youngstown, Ohio 44503.

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In the Supreme Court of the United States

OCTOBER TERM, 1966.

No. 1398.

CHARLES CARABBIA,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

QUESTIONS PRESENTED.

1. Did Petitioner suffer an abridgment of his Sixth Amendment rights to an impartial jury and the right of confrontation and was the State of Ohio obligated by the Fourteenth Amendment to give equal protection of the laws where:

(A) A juror on voir dire failed to disclose her 40-year friendship with a detective employed in the office of the Prosecuting Attorney.

(B) The trial court overruled pre-trial motions for election of duplicating counts and overlapping counts, such motions having been renewed at the close of the State's case where such court found there could be no intent in two of such counts.

2. Did Petitioner suffer an abridgment of his Fifth Amendment and Sixth Amendment rights by being brought to a speedy trial, where he was compelled to be

a witness against himself during the accusatory and custodial state of proceedings and where at such times he was deprived of the right to the advice of counsel and later deprived of the effective representation by counsel.

STATUTES INVOLVED.

Ohio Revised Code Section 2901.23; Ohio Revised Code Section 2901.24; Ohio Revised Code Section 2901.241; Ohio Revised Code Section 2941.04; Ohio Revised Code Section 2945.02. See Appendix.

STATEMENT.

The Petitioner, Charles Carabbia, was indicted secretly by the Mahoning County Ohio Grand Jury in the January Term 1964. The indictment was returned on March 5, 1964, Case No. 22255. The Petitioner was indicted on three separate counts in the one indictment, to-wit: Count No. 1, Ohio Revised Code Section 2901.23; Count No. 2, Ohio Revised Code Section 2901.24; and Count No. 3, Ohio Revised Code Section 2901.241. On March 6, 1964 the Petitioner appeared personally in court with his counsel and waived the reading of the indictment and entered a plea of not guilty to each count. A bond was set by the court at this time.

The Petitioner was arrested on March 2, 1964. On March 30, 1964 the trial commenced before the Honorable Erskine Maiden, Jr., Judge of the Court of Common Pleas of Mahoning County, Ohio, and on April 6, 1964, the jury found the Petitioner guilty under Count No. 3, Ohio Revised Code Section 2901.241 and not guilty under Counts No. 1 and No. 2. On April 17, 1964, after the hearing on the Motion For New Trial, said Motion was overruled and Petitioner was sentenced to a term of not less

than one nor more than five years in the Ohio State Penitentiary.

An appeal was perfected to the Court of Appeals, Seventh Judicial District of Ohio, and on October 13, 1966 said Court of Appeals unanimously affirmed the verdict and judgment of the trial court. Petitioner then filed his Notice of Appeal from the decision of the Seventh District Court of Appeals of Ohio to the Ohio Supreme Court. On February 8, 1967 the Supreme Court of the State of Ohio, in Case No. 40605, dismissed Petitioner's appeal, Sua Sponte, and ruled no substantial constitutional question was involved. No opinion was written by the Supreme Court of the State of Ohio.

ARGUMENT.

Petitioner's contention that a juror on voir dire failed to disclose her forty-year friendship with a detective employed in the office of the Prosecuting Attorney is not well taken. The trial commenced on March 30, 1964 and the attorney for Petitioner, in a signed affidavit, admitted he knew the juror in question was seen saying "hello" to the county detective on April 3, 1964. However, even though defense counsel is an officer of the court, this matter was not called to the attention of the trial judge at that time even though the trial continued to April 6, 1964. Had defense counsel called the matter to the attention of the trial judge and, if the acquaintanceship of the juror and the county detective had been considered prejudicial by the trial judge, the juror could have been dismissed and the alternate juror could have replaced her. The Seventh District Court of Appeals ruled that Petitioner and Petitioner's counsel did not exercise due diligence in calling this incident to the trial court's attention when the attorney knew about it in time for it to be corrected and

that Petitioner, thereby, waived any claim to this alleged error. (4 *O. J.* 2nd, 474, Section 1129.)

At a hearing in the Common Pleas Court in the above-alleged error, there was never the slightest evidence or hint that the fact that a juror knew the county detective of the Prosecuting Attorney's office had any bearing whatsoever on her verdict in this case. Incidentally, this acquaintanceship was denied by the county detective at the hearing. A reading of the record will reveal that the juror in question was never asked whether she knew the county detective. Before even misconduct of a juror is a ground for a new trial, it must be shown that the substantial rights of the Petitioner have been materially affected. (16 *O. J.* 2nd, Criminal Law No. 2, Section 671 *et seq.*) It was further brought out in the hearing on this matter that the county detective had been employed by the Youngstown Police Department for over thirty years prior to his employment with the County Prosecutor's office and that he had no recollection of ever having seen this juror previously.

The State of Ohio contends that Question No. 1 (B) raised by Petitioner is not well taken. Ohio Revised Code Section 2941.04 permits various counts under the same indictment and, also, states the prosecutor need not elect between the different offenses and counts set forth in the indictment. The authorities have been uniform in maintaining the right of the prosecutor where a single offense has been committed to include a number of counts in one indictment variously framed that meet possible contingencies that may arise in the introduction of the evidence. (28 *O. J.* 2nd, Criminal Law, Section 69.)

In 28 *O. J.* 2nd, Criminal Law, Section 71, the question of requiring a prosecutor to elect between counts is discussed and it says Ohio Revised Code Section 2941.04,

supra, makes it plain and it is so held that the prosecutor will not be required to elect where the several charges in the indictment relate to the same transaction, are connected together in their commission, or are simply variations or modifications. See *Overmyer vs. Sacks,* 174 O. S. 129; *Bates vs. State,* 29 O. A. 391.

In reply to Question No. 2 raised by Petitioner, twenty-four days elapsed from the time a not guilty plea was entered until the day the trial commenced. Ohio Revised Code Section 2945.02 requires the trial court to set all criminal cases for trial for a day not later than thirty days after the date of entry of the plea of Petitioner. This procedure was followed in the instant case.

The Petitioner was never compelled to be a witness against himself during the accusatory and custodial state of the proceedings and, further, he was never deprived of the right to the advice of counsel or at any time later deprived of effective representation by counsel. Respondent fails to see how the doctrine expressed in *Escobedo vs. Illinois,* 378 U. S. 478 (1964), and *Miranda vs. Arizona,* 384 U. S. 436 (1966), can in any way apply to the instant case. For that matter, counsel for Respondent fails to see how any of the impressive list of citations enumerated by Petitioner have any bearing on this particular case. A Motion for continuation to a subsequent term is addressed to the sound discretion of the court and the action of the lower court cannot be reversed unless it clearly appears from all the facts and circumstances that there has been an abuse of discretion operating to the prejudice of the party and the final determination of the case. (15 *O. J.* 2nd, Section 494, page 655; 3 *O. J.* 2nd, 730, Appellate Review, Section 765.) In the instant case the rights of the Petitioner, obviously, were not prejudiced because he was found not guilty by the jury on two of the three counts that he was indicted on.

CONCLUSION.

Respondent respectfully submits that the Petition for a Writ of Certiorari filed herein by Petitioner should be dismissed for the reason that no substantial question of injury to any rights of the Petitioner has been presented.

THOMAS R. ZEBRASKY,
Assistant Prosecuting Attorney,
Attorney of Record for Respondent.

CLYDE W. OSBORNE,
Prosecuting Attorney,

WILLIAM G. HOUSER,
Assistant Prosecuting Attorney,
Mahoning County Court House,
Market Street,
Youngstown, Ohio 44503.

APPENDIX A.

MEMORANDUM OPINION OF THE COURT OF APPEALS FOR MAHONING COUNTY, OHIO.

Dated: July 26, 1966.

LYNCH, *J.*

This is an appeal on questions of law by defendant-appellant on his conviction of assault on Rhonda Pinciaro with a loaded .38 caliber revolver and a sentence of one to five years in the Ohio State Penitentiary.

Defendant was indicted on three counts with reference to the alleged assault on Rhonda Pinciaro, namely, (1) shooting with intent to kill, wound or maim contrary to Section 2901.23, Revised Code, (2) assault with intent to kill contrary to Section 2901.24, Revised Code, and (3) assault with a dangerous weapon or instrument likely to produce death or great bodily harm contrary to Section 2901.241, Revised Code.

Defendant filed motions to quash the indictment and to compel the State of Ohio to elect between counts in the indictment, which were overruled. After trial, the jury found defendant guilty under Count No. 3, and not guilty under Counts No. 1 and No. 2.

A review of the record reveals ample evidence to substantiate the verdict of the jury; therefore, we overrule defendant's eighth assignment of error which contends that the verdict of the jury is contrary to the weight of the evidence and the law.

Defendant's sixth assignment of error alleged misconduct on the part of juror Miss Olivia Brown, who failed to disclose on voir dire examination, while under oath, that she was acquainted with Mr. Clyde Reid, who is employed as a detective by the County Prosecutor. Miss Brown signed a statement that she was introduced to Mr.

Reid through one of her friends many years ago. She spoke to Mr. Reid during the course of the trial, and this came to the attention of the attorney for defendant, who spoke to Mr. Reid concerning this. This trial commenced on March 30, 1964, and the attorney for defendant in a signed affidavit admitted that he knew about Mrs. Moore talking to Mr. Reid by April 3, 1964. However, this was not called to the attention of the Trial Judge, even though the trial continued to April 6, 1964. If this had been called to the attention of the Trial Judge, and if the acquaintanceship of Miss Brown and Mr. Reid had been considered prejudicial to defendant by the Trial Judge, Miss Brown could have been dismissed and the alternate juror could have replaced her. We hold that defendant did not exercise due diligence in calling this incident to the Trial Court's attention when his attorney knew about it in time for it to be corrected, and that the defendant has thereby waived any claim to this alleged error. 4 Ohio Jurisprudence (2d) 474, Section 1129.

Moreover, Mr. Reid testified that he had been employed with the Youngstown Police Department for almost thirty years prior to his present employment; that Miss Brown did speak to him during the course of the trial, but that he had no recollection of having even seen Miss Brown previously.

We cannot see how the bare acquaintanceship of Miss Brown with Mr. Reid could in any way influence either Miss Brown or the ultimate jury verdict. There is nothing in the record to indicate that Miss Brown's failure to disclose her acquaintanceship with Mr. Reid was intentional. We, therefore, hold that Miss Brown's presence on this jury was not prejudicial to the defendant.

In his fifth assignment of error defendant claims that a witness, Assistant Chief Robert Fink, of the Boardman

Township Police Department, gave a highly prejudicial answer. (Page 556, Volume 3.) On cross-examination, Officer Fink had testified that he had followed defendant to Rhonda Pinciaro's residence on several occasions prior to the incident which is the subject of this case. On re-direct examination, Officer Fink was asked why he followed defendant's car on prior occasions, to which he answered:

"He is a known racketeer, sir."

Defendant's attorney moved that this answer be stricken and that the Court withdraw a juror and continue this case. The Court ruled as follows:

> "That is stricken out as being a conclusion and the jury will disregard it. That is merely his opinion and opinions do not count at all. The motion to withdraw is overruled. Exception."

We hold that the Trial Court adequately cautioned the jury on this testimony, and that under the circumstances of this case, this was not prejudicial to the defendant.

We hold that the first two assignments of error which contend that the Trial Court erred in overruling the motions of defendant to quash the indictment and to order the State of Ohio to elect between counts in the indictment are not well taken. Section 2941.04, Revised Code. 28 *Ohio Jurisprudence* (2d) 482-486, Sections 69-71. See *Overmyer v. Sacks*, 174 Ohio St. 129; *Bates v. State*, 27 Ohio App. 391.

We also hold that the defendant's third assignment of error, which contends that the Trial Court erred in refusing the motion of defendant for continuance of the case is not well taken. 3 *Ohio Jurisprudence* (2d) 730, Appellate Review, Section 765, states as follows:

"An application for the continuance of a case is addressed to the sound discretion of the court, and its action cannot be reversed on error unless it clearly appears, from all the facts and circumstances, that there has been an abuse of this discretion, operating to the prejudice of the party in the final determination of the case * * *."

We hold that defendant has not clearly shown that the Trial Court abused its discretion in overruling this motion.

We also hold that defendant's fourth assignment of error, which contends that the Trial Court erred in limiting and restricting defendant in the interrogation of the members of the jury panel on the voir dire examination is not well taken. The counsel for defendant was given wide latitude in his questioning of prospective jurors, and the record shows the Trial Court kept the examination within proper limits.

32 *Ohio Jurisprudence* (2d), §63, Jury, Section 73, states in part as follows:

"* * * the scope and extent of the examination is largely within the discretion of the trial judge, and is not a ground for reversal unless there is a clear abuse of such discretion; * * *."

We hold that there was no such abuse of discretion in this case.

We have considered the other assignments of error of defendant and find them without merit.

After a careful examination of the record of this case, we conclude that this case was tried in a fair and thorough manner by experienced counsel for both sides before an experienced Judge. Counsel for both sides and the Trial Judge ably performed their respective roles in the trial of this case. We conclude that defendant received a fair trial.

There was an issue of fact in this case which was properly submitted to the jury. We feel that the verdict

of the jury indicates that they gave careful consideration to the evidence in this case. Defendant's right to a fair and impartial trial has been fulfilled, and he must abide by the verdict of the jury.

Judgment affirmed.

JOHNSON, *P.J.*, Concurs.
JONES, *J.*, Concurs.

APPROVED,
JOHN J. LYNCH,
Judge.

APPENDIX B.

JOURNAL ENTRY OF THE COURT OF APPEALS FOR MAHONING COUNTY, OHIO.

(Filed October 13, 1966.)

This cause came on for hearing upon the appeal on questions of law, assignments of error, bill of exceptions, the transcript and the original papers and pleadings from the Court of Common Pleas, Mahoning County, Ohio, and was argued by counsel. On full consideration thereof the Court finds there is no error apparent on the record in said proceedings and judgment prejudicial to the Appellant.

It is therefore considered by the Court that the judgment of the Court of Common Pleas be and the same is hereby affirmed at the costs of the Appellant.

It is further ordered that a special mandate be sent to the Court of Common Pleas of Mahoning County, Ohio, for execution upon this judgment.

To all of which Appellant, by his counsel, excepts.

APPENDIX C.

MANDATE OF THE SUPREME COURT OF THE STATE OF OHIO.

(February 8, 1967.)

To the Honorable Common Pleas Court Within and for the County of Mahoning, Ohio, Greeting:

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Dismissed, sua sponte, no substantial constitutional question involved.

THOMAS L. STARTZMAN,
Clerk.

APPENDIX D.

JOURNAL ENTRY OF THE COURT OF COMMON PLEAS, MAHONING COUNTY, OHIO.

(April 17, 1964.)

This day came on for hearing the motion for new trial filed herein, and the defendant Charles Carabbia being present in Court with counsel and the Prosecuting Attorney being present, the motion was heard and submitted; and thereupon the Court after full and due consideration overrules the same, with exceptions noted.

Defendant in open court waives his statutory right to file an application for probation.

Thereupon the Court proceeds to sentence; and the Court inquires of defendant Charles Carabbia whether

he have anything to say as to why sentence should not be pronounced; it is the sentence of the Court that defendant Charles Carabbia be taken from here to the County Jail and from thence to the Ohio State Penitentiary there to serve an indeterminate term according to law, of not less than 1 year nor more than 5 years and to pay the costs, this sentence being under R. C. 2901.241. Stay of execution is granted for 30 days to file an appeal and sentence is supended under R. C. 2953.09 pending completion of appellate proceedings, upon giving recognizance in the amount of $10,000.00.

E. MAIDEN, JR., *Judge.*

APPENDIX E.

INDICTMENT FOR INTENTIONAL SHOOTING: ASSAULT WITH INTENT TO KILL; ASSAULT WITH A DANGEROUS OR DEADLY WEAPON (3 COUNTS) (FELONY).

THE STATE OF OHIO, MAHONING COUNTY, SS.

In the Court of Common Pleas, Mahoning County, Ohio, of the Term of January in the year of our Lord one thousand nine hundred and sixty-four.

The Jurors of the Grand Jury of the County of Mahoning, and State of Ohio, then and there duly empaneled, sworn and charged to inquire of and present all offenses whatever committed within the limits of said County, on their said oaths, in the name and by the authority of the State of Ohio, do find and present:

That Charles Carabbia late of said County, on or about the 2nd day of March in the year of our Lord one

thousand nine hundred and sixty-four, at the County of Mahoning aforesaid,

FIRST COUNT: Did unlawfully and maliciously shoot at one Rhonda Pinciaro with intent to kill, wound or maim said Rhonda Pinciaro contrary to the statute in such cases made and provided and against the peace and dignity of the State of Ohio, to-wit: Revised Code 2901.23.

SECOND COUNT: And the said Grand Jury does further find and present that the said Charles Carabbia, late of said County, on or about the 2nd day of March, 1964, did unlawfully assault Rhonda Pinciaro with intent to kill her, contrary to the statute in such cases made and provided and against the peace and dignity of the State of Ohio to-wit: Revised Code 2901.24.

THIRD COUNT: And the said Grand Jury does further find and present that the said Charles Carabbia, late of said County, on or about the 2nd day of March, 1964, did unlawfully assault one Rhonda Pinciaro with a dangerous weapon or instrument likely to produce death or great bodily harm, to-wit: a loaded .38 caliber revolver, contrary to the statute in such cases made and provided and against the peace and dignity of the State of Ohio, to-wit: R. C. 2901.241.

CLYDE W. OSBORNE,
Prosecuting Attorney.

APPENDIX F.

STATUTES.

Ohio Revised Code Section 2901.23—Intentional shooting, cutting or stabbing.

No person shall maliciously shoot, stab, cut, or shoot at another person with intent to kill, wound, or maim such person.

Whoever violates this section shall be imprisoned not less than one nor more than twenty years.

Ohio Revised Code Section 2901.24—Assault with intent to kill, rape, or rob.

No person shall assault another with intent to kill, or to commit robbery or rape upon the person so assaulted.

Whoever violates this section shall be imprisoned not less than one nor more than fifteen years; except that whoever violates this section by assaulting any person who is performing his duties as operator of any motor vehicle, streetcar, or trackless trolley, as defined in section 4511.01 of the Revised Code, used for the transportation of persons for hire shall be imprisoned not less than three nor more than fifteen years.

Ohio Revised Code Section 2901.241—Assault with a dangerous or deadly weapon.

No person shall assault another with a dangerous weapon or instrument or by other means or force likely to produce death or great bodily harm.

Whoever violates this section shall be imprisoned in the penitentiary not less than one nor more than five years.

Ohio Revised Code Section 2941.04—Two or more offenses in one indictment.

An indictment or information may charge two or more different offenses connected together in their commission, or different statements of the same offense, or two or more different offenses of the same class of crimes or offenses, under separate counts, and if two or more indictments or informations are filed in such cases the court may order them to be consolidated.

The prosecution is not required to elect between the different offenses or counts set forth in the indictment or information, but the defendant may be convicted of any number of the offenses charged, and each offense upon which the defendant is convicted must be stated in the verdict. The court in the interest of justice and for good cause shown, may order different offenses or counts set forth in the indictment or information tried separately or divided into two or more groups and each of said groups tried separately. A verdict of acquittal of one or more counts is not an acquittal of any other count.

Ohio Revised Code Section 2945.02—Setting and continuing cases.

The court of common pleas shall set all criminal cases for trial for a day not later than thirty days after the date of entry of the plea of the defendant. No continuance of the trial shall be granted except upon affirmative proof in open court, upon reasonable notice, that the ends of justice require a continuance.